

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CIVIL DIVISION, ROOM NO. F12
CAUSE NO. 49F12-0808-CC-039232

IN THE MATTER OF:

OBJECTION TO THE DENIAL OF EXCESS
LIABILITY TRUST FUND CLAIM NO. 200202501-8
GASAMERICA #45
GASAMERICA SERVICES, INC.

INDIANA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT,
Petitioner,

v.

LEE & RYAN ENVIRONMENTAL CONSULTING, INC.
Respondent.

FILED

(189) MAR 24 2009

Elizabeth A. White
CLERK OF THE MARION SUPERIOR COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came before the Court on the Indiana Department of Environmental Management's ("IDEM") Verified Petition for Judicial Review of the Office of Environmental Adjudication's ("OEA") Findings of Fact, Conclusions of Law and Final Order (the "OEA Final Order"). The OEA granted summary judgment in favor of Lee & Ryan Environmental Consulting, Inc. ("Lee & Ryan") and found that Lee & Ryan is entitled to full reimbursement of certain claims, including costs related to a Phase II investigation, submitted to Indiana's Excess Liability Trust Fund ("ELTF"). The parties have submitted their briefs and conducted oral argument before the Court. The Court now finds in favor of Lee & Ryan, denies IDEM's Petition and enters its Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. Lee & Ryan was engaged to perform environmental work at a convenience store and gas station located at 5058 W. Highway 52, New Palestine, Indiana (FID # 16482) ("Site") and to submit claims for reimbursement from the ELTF.

2. On January 24, 2002, Lee & Ryan conducted a Phase II Subsurface Investigation at the Site.

3. A release at the Site was reported to IDEM on or about February 4, 2002.

4. On or about September 2, 2003, Lee & Ryan submitted an application for reimbursement from the ELTF ("ELTF Claim") for site investigation work performed at the Site between January 1, 2002 and February 28, 2002, and costs related to the Phase II were included in this application.

5. On or about October 21, 2003, IDEM issued a determination ("Determination") denying reimbursement of the Phase II costs in the amount of \$9,836.99, which was part of the amount claimed for reimbursement in the ELTF Claim. As the reason for denying this portion of Lee & Ryan's ELTF Claim, IDEM's Determination stated that "costs for work performed prior to the date the release was reported to IDEM are not reimbursable."

6. The Determination was appealed to the Office of Environmental Adjudication on or about October 23, 2003.

7. On July 24, 2008, the Environmental Law Judge issued her Findings of Fact, Conclusions of Law and Final Order granting summary judgment for Lee & Ryan that costs related to the Phase II environmental investigation were eligible for reimbursement from the ELTF.

8. On August 25, 2008, IDEM timely filed its Verified Petition for Judicial Review.

CONCLUSIONS OF LAW

Standard Of Review

1. This case involves judicial review of an agency determination under the Administrative Orders and Procedures Act ("AOPA"). Ind. Code § 4-21.5-5-1 et seq. In

reviewing an OEA order in this judicial review proceeding, the trial court is required to apply a deferential, appellate standard of review. *Indiana Dept. of Natural Resources v. United Refuse Company, Inc.*, 615 N.E. 2d 100, 104 (Ind. 1993); Ind. Code § 4-21.5-5-14. A trial court's review of a final agency action is confined to the agency record. Ind. Code § 4-21.5-58-11.

2. Judicial review is limited in scope. *Indiana State Bd. of Educ. v. Brownsburg Cmty. Sch. Corp.*, 865 N.E.2d 660, 665 (Ind. Ct. App. 2007) (citing *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000)). The burden of demonstrating that an agency's action is invalid rests with the party asserting the invalidity. *Id.* (citing Ind. Code § 4-21.5-5-14(a)). A court may set aside an agency action only if it determines that the action is:

(1) arbitrary, capricious, and abuse of discretion or otherwise not in accordance with law; (2) contrary to a constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

Ind. Code § 4-21.5-5-14(d); *Ind. Dept. of Env'tl. Mgmt. v. Lake County Solid Waste Management District*, 847 N.E.2d 974, 981 (Ind. Ct. App. 2006), *trans. denied*.

3. An agency's action is "arbitrary and capricious when it is made without any consideration of the facts and lacks any basis that may lead a reasonable person to make the same decision" *Lake County Solid Waste Mgmt. Dist.*, 847 N.E.2d at 983 (quoting *Ind. Dept. of Env'tl. Mgmt. v. Schnippel Constr., Inc.*, 778 N.E.2d 407, 412 (Ind. Ct. App. 2002), *trans. denied*). OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adjud.*, 811 N.E.2d 806, 809 (Ind. 2004); *see also* Ind. Code § 4-21.5-3-27(d). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565 n.1 (Ind. Ct. App. 1993), *trans. denied*.

Whether Phase II Costs are Eligible for Reimbursement

4. The ELTF was established “[to provide] a source of money to satisfy liabilities incurred by owners and operators of underground petroleum storage tanks under IC 13-23-13-8 for corrective action.” Ind. Code § 13-23-7-1(2).

5. Prior to the rule amendments in August 2004, “corrective action” was defined as “action taken to minimize, contain, eliminate, remediate, mitigate, or clean up a release, including emergency measures taken as part of an initial response to the release under rules of the solid waste management board at 329 IAC 9-5-2.” 328 IAC 1-1-3 (2003).

6. In August 2004 the definition was revised and now defines “corrective action” as:

"Corrective action" means any or all work performed or to be performed, including all work performed or to be performed under a CAP as defined under section 3.1 of this rule and rules of the solid waste management board at 329 IAC 9-1-14.7, to:

- (1) minimize;
 - (2) contain;
 - (3) eliminate;
 - (4) remediate;
 - (5) mitigate; or
 - (6) clean up a release caused by an occurrence;
- including emergency measures taken as part of an initial response to the release under rules of the solid waste management board at 329 IAC 9-5-2.

328 IAC 1-1-3 (current).

7. In cases that do not involve third party liability suits, the ELTF may only reimburse “costs allowed under IC 13-23-9-2 ... arising out of releases of petroleum.” Ind. Code § 13-23-8-1(1).

8. Ind. Code § 13-23-9-2(b)(3)(A) requires that reimbursement for costs may be obtained only if, *inter alia*, the work “concerns the elimination and mitigation of a release of petroleum from an underground storage tank...including release investigation.”

9. The work for which Lee & Ryan is seeking reimbursement constituted investigation of a leaking UST system. The purpose of this work was squarely within the scope of ELTF reimbursement (that is, to assess contamination coming from a UST system) and the data gathered were used in the report characterizing the Site's contamination caused by the release as submitted to IDEM.

10. The Determination was for the reason that "costs for work performed prior to the date the release was reported to IDEM are not reimbursable." No regulations applicable prior to September 29, 2004 provide IDEM with the legal authority to deny costs on the basis that they were incurred "prior to the date the release was reported to IDEM." Therefore, the timing of the work was not a valid basis for denial.

11. The OEA Final Order's finding that Lee & Ryan's ELTF Submittal was an investigation eligible for reimbursement was based on substantial evidence, and supported by law.

Whether "Shall" in Ind. Code § 13-23-9-2(d) is Directory or Mandatory

12. Ind. Code § 13-23-9-2(d) states that IDEM "shall notify the claimant of all reasons for denial" after reviewing an application. Lee & Ryan argue that the "shall" in Ind. Code § 13-23-9-2(d) should be construed as mandatory such that any legitimate reason for denial is waived if not included in the determination letter.

13. Here, there has been no specific waiver of any reason for denial and many Indiana cases have found that in certain circumstances, "shall" may be construed to be merely directory and not mandatory if doing so would effectuate the intent of the legislature. *See Allen County Dept. of Pub. Welfare v. Ball Memorial Hosp. Ass'n.*, 252 N.E.2d 424, 427 (Ind.1969); *see also May v. Dept. of Nat. Resources*, 565 N.E.2d 367 (Ind. Ct. App. 1991), *trans. denied*.

14. The OEA correctly concluded that to the extent that IDEM's subsequent legal argument serves as a new basis for denial, Ind. Code § 13-23-9-2(d) does not prohibit IDEM from asserting a new basis for denial since the term "shall" was construed as directory and not mandatory.

FINAL ORDER


IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court as follows:

1. There is substantial evidence that Lee & Ryan's ELTF Claim was for reimbursement of work that "concerns the elimination or mitigation of a release of petroleum from an underground storage tank including . . . release investigation" (Ind. Code § 13-23-9-2(b)(3)(A)), and was otherwise necessary for corrective action at the Site. As such, the OEA Final Order granting reimbursement of these costs was consistent with applicable ELTF laws and regulations, and the OEA correctly found that Lee & Ryan was entitled to reimbursement of its ELTF Claim.

2. For the foregoing reasons, the Court DENIES IDEM's Verified Petition for Judicial Review and FINDS in favor of Lee & Ryan.

3. The Court finds that Lee & Ryan is entitled to reimbursement of its ELTF Claim in the amount of \$9,836.99. This judgment shall be deemed as final and there is no just cause for delay in entering the same.

ORDERED THIS 27TH DAY OF MARCH, 2009.



Judge, Marion Superior Court
Civil Division, Room No. F12

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